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IN THE

Supreme Court of the United States

CLEANCOALITION; ROBERTSON COUNTY: OUR LAND, OUR LIVES,

Petitioners,

v.

TXU POWER, doing business as TXU GENERATION COMPANY LP; OAK GROVE MANAGEMENT COMPANY LLC; and TXU CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

This matter relates to Clean Air Act ("CAA" or "Act") section 304(a)(1) and 304(a)(3), 42 U.S.C. § 7604(a)(1) and 7604(a)(3). Petitioners CleanCOALition and Robertson County: Our Land, Our Lives (collectively, "CleanCOALition") contend Congress: (1) enacted CAA section 304(a)(1) to allow private citizens to, *inter alia*, stop violations of the CAA that can occur before a person obtains a CAA permit, and (2) enacted CAA section 304(a)(3) to allow citizens to stop persons from constructing CAA facilities without permits that comply with the CAA. Various courts, including the courts in this matter, have disagreed with these constructions of the statutory provisions. In so doing, CleanCOALition contends courts have eliminated causes of action central to Congress's intended objectives under and enforcement of the CAA.

The district court in this matter held, though there is conflict between courts, the *Burford* abstention doctrine is a valid basis for courts to forgo jurisdiction over section 304 citizen suits. The questions presented for review therefore are as follows:

1. Whether CAA section 304(a)(1) authorizes a citizen suit to redress violations that occur before a person obtains a CAA permit.

2. Whether CAA section 304(a)(3) authorizes a citizen suit against entities that propose to construct or construct a CAA facility without a permit that complies with the CAA.

3. Whether the "abstention" doctrine created in *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), is inapplicable to CAA citizen suits as a matter of law.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rules 14.1(b) and 29.6, Petitioners CleanCOALition state they do not have a parent corporation, and no publicly held corporation owns 10% or more of CleanCOALition.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF APPENDICES	vii
TABLE OF CITED AUTHORITIES	viii
OPINIONS BELOW	1
JURISDICTIONAL STATEMENT	1
STATUTE INVOLVED	2
STATEMENT OF THE CASE	4
A. BASES for CleanCOALition's Citizen Suit	4
B. The CAA Permitting Process	5
C. TXU's PSD Permit and Related Obligations	5
D. Timing of PSD Obligations	7
E. The Proceedings Below	8

Contents

	Page
REASONS FOR GRANTING THE PETITION	9
A. Introduction	9
B. Congress Enacted CAA Section 304(a)(1) to Allow Citizens to Sue to Stop Pre-permit Violations	12
1. Pre-permit violations are actionable under the plain language of section 304(a)(1) and the structure of the CAA	13
a. Pre-permit conditions and requirements under part C of subchapter I of the CAA constitute actionable emissions standards or limitations	14
i. Rules of grammar support CleanCOALition's construction of CAA section 304(f)(3)	15
ii. The structure of the CAA supports CleanCOALition's construction of CAA section 304(f)(3)	21

Contents

Page

b. The standards and limitations in Texas's SIP constitute actionable emissions standards or limitations 23

2. The matters at issue in this lawsuit can be resolved and the public interest will be served if the Court resolves the proper operation of CAA section 304(a)(1) 25

C. The Matters in this Lawsuit Can Be Resolved and the Public Interest Will Be Served if the Court Resolves whether CAA Section 304(a)(3) Operates to Prevent Construction of Plants Based on Defective PSD Permits 28

D. The Matters in this Lawsuit Can Be Resolved and the Public Interest Will Be Served if the Court Resolves whether the *Burford* Abstention Doctrine Is Inapplicable to CAA Citizen Suits 30

1. Historical basis for the *Burford* abstention doctrine 31

2. *Burford* abstention should not be extended to CAA citizen suits 32

Contents

Page

3. Federal courts have exclusive jurisdiction over CAA citizen suits ... 34

a. In the CAA, Congress used the phrase "district courts" regarding only federal courts 34

b. Contextual language necessitates construction of "district courts" to mean federal district courts 36

CONCLUSION 40

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Fifth Circuit Filed July 21, 2008 ..... 1a

Appendix B — Order Of The United States District Court For The Western District Of Texas, Waco Division Dated And Filed May 21, 2007 ..... 25a

TABLE OF CITED AUTHORITIES

Page

Cases

Allison Engine Co., Inc. v. United States,
128 S. Ct. 2123 (2008) 19

Brewer v. City of Bristol,
577 F. Supp. 519 (E.D. Tenn. 1983) 31

Burford v. Sun Oil Co.,
319 U.S. 315 (1943) ..... *passim*

Christensen v. Harris County,
529 U.S. 576 (2000) 32

CleanCOALition v. TXU Power,
536 F.3d 469 (5th Cir. 2008) 1

Comm'r v. Lundy,
516 U.S. 235 (1996) 36

Comm'r of Internal Revenue v. Engle,
464 U.S. 206 (1984) 9

Culbertson v. Coats Am., Inc.,
913 F. Supp. 1572 (N.D. Ga. 1995) 31

Duncan v. Walker,
533 U.S. 167 (2001) 21

Ellis v. Gallatin Steel Co.,
390 F.3d 461 (6th Cir. 2004) 31

Cited Authorities

Page

Flora v. United States,
357 U.S. 63 (1958) 18

Freeman v. Cincinnati Gas & Elec. Co.,
No. 1:05CV179, 2005 WL 2837466
(S.D. Ohio Oct. 27, 2005) 26

Freytag v. Comm'r of Internal Revenue,
501 U.S. 868 (1991) 32

Griffin v. Oceanic Contractors, Inc.,
458 U.S. 564 (1982) 36

Hathorn v. Lovorn,
457 U.S. 255 (1982) 33

Hempstead County Hunting Club v. Sw. Elec. Power Co.,
No. 08-CV-4038, 2008 WL 2705570
(W.D. Ark. 2008) 10

Jones v. United States,
527 U.S. 373 (1999) 21

L.E.A.D. v. Exide Corp.,
No. Civ. 96-3030, 1999 WL 124473
(E.D. Pa. February 19, 1999) 31

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992) 9

Cited Authorities

Page

Natural Res. Def. Council, Inc. v. Train,
510 F.2d 692 (D.C. Cir. 1974) 10

Or. State Pub. Interest Research Group v. Pac. Coast Seafood Co.,
341 F. Supp. 2d 1170 (D. Or. 2004) 31

62 Cases, More or Less, Each Containing Six Jars of Jam v. United States,
340 U.S. 593 (1951) 19

Student Pub. Interest Research Group of New Jersey, Inc. v. P.D. Oil & Chem. Storage, Inc.,
627 F. Supp. 1074 (D.N.J. 1986) 31

Sugarloaf Citizens Ass'n v. Montgomery County,
No. 93-2475, 1994 WL 447442
(4th Cir. August 17, 1994) ..... *passim*

Weiler v. Chatham Forest Prods., Inc.,
392 F.3d 532 (2d Cir. 2004) ..... *passim*

Cited Authorities

Page

Statutes

28 U.S.C. § 1254 2

42 U.S.C. § 3613 37

42 U.S.C. § 7401 ..... 9, 11, 30

42 U.S.C. § 7410 ..... 5, 34

42 U.S.C. § 7413 34

42 U.S.C. § 7471 18

42 U.S.C. § 7475 ..... *passim*

42 U.S.C. § 7479 ..... 6, 25

42 U.S.C. § 7523 35

42 U.S.C. § 7524 35

42 U.S.C. § 7603 35

42 U.S.C. § 7604 ..... *passim*

42 U.S.C. § 7661a 37

42 U.S.C. § 7661d 26

30 TEX. ADMIN. CODE § 116.111 7

30 TEX. ADMIN. CODE § 116.116 7

Cited Authorities

Page

Other Authorities

40 C.F.R. § 51.166 24

40 C.F.R. § 54.2 33

40 C.F.R. § 70.4 37

H. Conf. Rep. No. 564, at 173 (1977), *as reprinted in* 1977 U.S.C.C.A.N. 1502 .... 20, 29

Courts (including the United States Court of Appeals for the Fifth Circuit and district court in this matter) have established precedents that subvert Congress's creation of causes of action central to enforcement of the CAA. This has prevented CleanCOALition, and otherwise will prevent citizens, from enforcing Congress's objectives under the CAA. CleanCOALition therefore respectfully requests that the Court grant this Petition for Writ of Certiorari.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at *CleanCOALition v. TXU Power*, 536 F.3d 469 (5th Cir. 2008) and reproduced herein as Appendix ("Appx.") Exhibit A. The opinion of the district court is not reported, but it is reproduced herein as Appx. Exhibit B.

JURISDICTIONAL STATEMENT

Respondents TXU Power, Oak Grove Management Company LLC, and TXU Corp. (collectively, "TXU") are violating CAA emissions standards and limitations and propose to construct a CAA facility without a permit that complies with the CAA. On December 1, 2006, CleanCOALition sued TXU in the district court under CAA section 304(a)(1) and 304(a)(3), 42 U.S.C. § 7604(a)(1) and 7604(a)(3).

The district court dismissed CleanCOALition's claims by Order dated May 21, 2007. *See* Appx. Exhibit B. CleanCOALition appealed to the United States Court of Appeals for the Fifth Circuit.

On July 21, 2008, the Fifth Circuit affirmed the district court's dismissal of CleanCOALition's claims. *See* Appx. Exhibit A. CleanCOALition did not seek rehearing of the Fifth Circuit's ruling, and it has not sought extensions of time to file its Petition for Writ of Certiorari in this Court.

Under 28 U.S.C. § 1254(1), this Court has jurisdiction to review, on a writ of certiorari, the Fifth Circuit's July 21, 2008 ruling.

STATUTE INVOLVED

The relevant statute in this matter is CAA section 304, 42 U.S.C. § 7604, which provides:

> (a) Authority to bring civil action; jurisdiction
>
> . . . any person may commence a civil action on his own behalf—
>
> > (1) against any person . . . who is alleged to have violated . . . or to be in violation of . . . an emission standard or limitation under this chapter . . .
> >
> > (3) against any person who proposes to construct or constructs any new or modified major emitting facility without a permit required under part C of subchapter I of this chapter (relating to significant deterioration of air quality) or part D of subchapter

I of this chapter (relating to nonattainment) or who is alleged to have violated . . . or to be in violation of any condition of such permit.

. . .

(f) . . .

For purposes of this section, the term "emission standard or limitation under this chapter" means—

. . .

(3) any condition or requirement of a permit under part C of subchapter I of this chapter . . . ; or

(4) any other standard, limitation, or schedule established . . . under any applicable State implementation plan . . ., [or] any permit term or condition . . . .

STATEMENT OF THE CASE

A. Bases for CleanCOALition's Citizen Suit

Appellants CleanCOALition are environmental interest groups whose members are concerned with the environmental health of the Southwest United States, including air quality.[1] Appellees TXU are utility interests that propose to construct a pulverized coal-fired power plant in Robertson County, Texas.[2] CleanCOALition's members reside in Robertson County, and elsewhere, and will be adversely affected by emissions from TXU's proposed plant.[3]

CleanCOALition sued TXU under CAA section 304(a)(1) and 304(a)(3), because TXU has violated emissions standards and limitations mandated by the CAA.[4] TXU also proposes to construct its power plant without a permit that complies with the CAA.[5]

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[1] Record on Appeal ("ROA"), pp. 2-3. As permitted by Supreme Court Rule 12.7, CleanCOALition cites the ROA maintained by the clerks of the lower courts.

[2] ROA, pp. 1, 5-6, 10, 11. The plant name is Oak Grove Steam Electric Station.

[3] ROA, pp. 3-5.

[4] ROA, pp. 1-44.

[5] *Id.*

B. The CAA Permitting Process

The United States Environmental Protection Agency ("EPA") authorizes states, including Texas, to issue permits for the construction of CAA facilities. *See* 42 U.S.C. § 7410(a)(2)(C).[6] The air permitting process in Texas is administered by the Texas Commission on Environmental Quality ("TCEQ").[7]

The TCEQ may issue several types of permits under the CAA, but the permit relevant to this matter is a construction permit issued pursuant to the CAA's Prevention of Significant Deterioration ("PSD") rules. *See* 42 U.S.C. §§ 7470-7492. The TCEQ implements these rules, as well as other provisions of the CAA, through a compilation known as the Texas "State Implementation Plan" (the "SIP"). *See generally* 42 U.S.C. § 7410(a)(2)(C).

C. TXU's PSD Permit and Related Obligations

In July and December 2005, TXU submitted applications to the TCEQ seeking a PSD permit to construct its proposed power plant.[8] In connection with its efforts to obtain the PSD permit, TXU was obligated, but failed, to satisfy "conditions and requirements" that are prerequisites for obtaining a valid PSD permit. For

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[6] This authorization does not grant, however, states jurisdiction over CAA citizen suits. Congress mandated such suits should be litigated in federal court. *See* 42 U.S.C. § 7604(a).

[7] ROA, pp. 100-105.

[8] ROA, pp. 5-6. The TCEQ since has issued TXU a PSD permit.

instance, the PSD program requires compliance with the conditions and requirements found in part C of subchapter I of the CAA (CAA sections 160-169, 42 U.S.C. §§ 7470-7492), which obligate persons to, *inter alia*, demonstrate:

1. "emissions from construction or operation of [a] facility will not *cause, or contribute to*, air pollution in excess of" limits established under the CAA. 42 U.S.C. § 7475(a)(3) (emphasis added);

2. "the proposed facility is subject to the *best available control technology* . . . ." 42 U.S.C. § 7475(a)(4) (emphasis added);[9] and

3. "there has been an analysis of *any air quality impacts* projected for the area as a result of growth associated with such facility . . . ." 42 U.S.C. § 7475(a)(6) (emphasis added).

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[9] "The term 'best available control technology' means an *emission limitation* based on the maximum degree of reduction of each pollutant . . . which the permitting authority . . . determines is achievable . . . through application of production processes and available methods, systems, and techniques, including fuel cleaning, clean fuels, or treatment or innovative fuel combustion techniques for control of each such pollutant." 42 U.S.C. § 7479(3) (emphasis added).

D. Timing of PSD Obligations

TXU was obligated to complete the foregoing, among other, conditions and requirements *before* it could receive a valid PSD permit. By way of example, the above-referenced conditions and requirements are accompanied by the admonition: "No major emitting facility . . . may be constructed . . . unless . . . the *proposed* permit has been subject to a *review* in accordance with this section . . . ." 42 U.S.C. § 7475(a)(2) (emphasis added).

Texas regulations implementing the CAA also provide: "In order to be *granted* a permit . . . the *application must include* . . . information which demonstrates that emissions from the facility . . . meet . . . Best available control technology . . . ." 30 TEX. ADMIN. CODE § 116.111(a)(2)(C) (emphasis added). The regulations also provide: "The following are the conditions upon which a permit . . . [is] *issued*: . . . representations with regard to construction plans and operation procedures in an *application* for a permit . . . ." 30 TEX. ADMIN. CODE § 116.116(a) (emphasis added).[10]

Accordingly, in practice, an entity that seeks to construct a CAA facility undertakes activities to satisfy PSD conditions and requirements before submitting a PSD permit application. The pre-permit stage therefore

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[10] *See also* 1976 *Texas State Implementation Plan* § XIV (Rules & Regulations) at Rule 603.1, found at http://www.tceq.state.tx.us/assets/public/implementation/air/sip/sipdocs/1976-SIP/1976_sip_section_xiv.pdf (enumerating what a CAA applicant *must* submit in an application and demonstrate *before* obtaining a PSD permit).

is when a person will either comply, or fail to comply, with the relevant PSD conditions and requirements.[11]

E. The Proceedings Below

TXU has violated the CAA, because it has not complied with the PSD conditions and requirements. The plain language of CAA section 304(a)(1) and 304(a)(3) authorized CleanCOALition's suit to redress these violations. The district court nevertheless dismissed CleanCOALition's claims under Federal Rule of Civil Procedure 12(b)(6), holding CleanCOALition failed to state claims upon which relief could be granted. The district court also held CleanCOALition lack standing, essentially because the court had concluded CleanCOALition could not assert claims under section 304(a)(1) and 304(a)(3). The district court finally held it would abstain from exercising jurisdiction over CleanCOALition's claims under the *Burford* abstention doctrine.

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[11] By way of example, the court in *New York v. Niagara Mowhawk Power Corp.* held:

> Implicit in the requirement that a facility be subject to [best available control technology] pursuant to 42 U.S.C. § 7475(a)(4) is an obligation on the part of the person proposing the construction or modification to obtain the appropriate [best available control technology] determination. [Defendant's] argument conveniently ignores the fact that the permitting authority never had the opportunity to determine [best available control technology] for the Facilities precisely because [Defendant] failed to follow the proper preconstruction procedures . . . .

263 F. Supp. 2d 650, 663 (W.D.N.Y. 2003).

The Fifth Circuit, as an issue of first impression, concluded section 304(a)(1) and 304(a)(3) does not support CleanCOALition's claims and affirmed the district court's 12(b)(6) dismissal.[12] These holdings, as well as holdings from other courts, not only have deprived CleanCOALition of viable causes of action, but also effectively write out of the CAA, provisions critical to its proper enforcement.

REASONS FOR GRANTING THE PETITION

A. Introduction

Congress enacted the CAA, 42 U.S.C. §§ 7401-7671q, with the objectives "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." 42 U.S.C. § 7401(b)(1). These objectives are not mere surplusage or academic principles that can be ignored when interpreting the CAA. Indeed, under principles of statutory construction, a court's "duty . . . is to find that interpretation which can most fairly be said to be imbedded in the statute, in the sense of being most harmonious with its scheme and with the general purposes that Congress manifested." *Comm'r of Internal Revenue v. Engle*, 464 U.S. 206, 217 (1984) (internal quotations omitted).

Protection and enhancement of the Nation's air resources depends upon active citizen enforcement of

[12] The Fifth Circuit declined to address the standing issue or resolve whether *Burford* abstention is impermissible in CAA citizen suits. CleanCOALition has standing under *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573 n.7 (1992), and abstention was improper for reasons discussed herein.

the CAA at a time when such enforcement can make a material difference. *See, e.g., Natural Res. Def. Council, Inc. v. Train*, 510 F.2d 692, 700 (D.C. Cir. 1974) ("citizens can be a useful instrument for detecting violations and bringing them to the attention of the enforcement agencies and courts alike."). The window of opportunity in which citizens meaningful can enforce the CAA is, however, narrow. *See, e.g., Hempstead County Hunting Club v. Sw. Elec. Power Co.*, No. 08-CV-4038, 2008 WL 2705570, **2-3 (W.D. Ark. 2008) (holding that even before an entity receives a PSD permit, it is allowed to undertake "a good deal of activity" towards construction of a CAA facility).

Congress enacted CAA section 304(a)(1) and 304(a)(3) to allow citizens to stop, *inter alia*, CAA violations that become evident before an entity obtains a PSD permit or begins constructing a CAA facility. The lower courts in this matter, as well as other courts, nevertheless have held section 304(a)(1) and 304(a)(3) does not support such causes of action. *See, e.g., Weiler v. Chatham Forest Prods., Inc.*, 392 F.3d 532, 538 (2d Cir. 2004) ("a section 304(a)(1) suit can only be brought against a private defendant *after* a facility has been built and begun operation.") (emphasis added); *Sugarloaf Citizens Ass'n v. Montgomery County*, No. 93-2475, 1994 WL 447442, at *8 n.9 (4th Cir. August 17, 1994) (unpublished) ("[U]ntil construction is *completed* . . . [defendants] can neither begin emissions nor violate any emissions standard.") (emphasis added).

These holdings put Congress's objectives under the CAA in jeopardy, because they relegate the CAA to a civil penalties statute that penalizes CAA violators only

after they have committed to courses of action (and possibly even completed construction of facilities) that may be contrary to CAA mandates. The holdings in *Weiler* and *Sugarloaf* particularly are indicative of this, as the Second and Fourth Circuits do not allow private citizens to enforce the CAA until *after* a CAA violator completes a facility or begins operations. 392 F.3d at 538; 1994 WL 447442 at *8 n.9.[13] Considering the CAA contains enforcement provisions intended to prevent, as an initial matter, the construction and operation of facilities that do not comply with the CAA, *see* 42 U.S.C. § 7604(a), the *Weiler/Sugarloaf* approach does little to "to protect and enhance the quality of the Nation's air resources . . . ." 42 U.S.C. § 7401(b)(1).

This case consequently is not merely about the lower courts' denial of CleanCOALition's legitimate causes of action against TXU. The very operation and objectives of the CAA are jeopardized by these and other courts' holdings. The matters at issue in this Petition therefore directly implicate important issues of federal law that have not been, but should be, resolved by this Court. *See* Supreme Court Rule 10(c).

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[13] The Fifth Circuit declined to resolve whether it will force citizens to delay a section 304(a) suit until after a PSD permit is issued or construction of a facility is commenced. *See* Appx. Exhibit A, p. 20a, n.11.

B. Congress Enacted CAA Section 304(a)(1) to Allow Citizens to Sue to Stop Pre-permit Violations

TXU is violating PSD conditions and requirements that constitute emissions standards and limitations under the CAA. Because these violations were evident before TXU obtained a PSD permit, CleanCOALition sued TXU under CAA section 304(a)(1), which authorizes suit "against any person . . . who is alleged to have violated . . . or to be in violation of . . . an *emission standard or limitation under this chapter* . . . ." 42 U.S.C. § 7604(a)(1) (emphasis added).[14]

The fundamental dispute in the lower courts was whether section 304(a)(1) authorizes suit to redress pre-permit violations or only violations that occur after a PSD permit has been issued. The plain language of section 304(a)(1), and structure of the CAA, dictates section 304(a)(1) authorizes suit for pre-permit violations. The lower courts in this matter, as well as other courts, nonetheless have held no such cause of action exists. These holdings undermine Congress's intended operation of the CAA.

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[14] The "under this chapter" reference is to the entirety of the CAA, which formally is known as Chapter 85 of the Air Pollution Prevention and Control Act.

1. Pre-permit violations are actionable under the plain language of section 304(a)(1) and the structure of the CAA

The trigger for a section 304(a)(1) cause of action is the violation of an "emission standard or limitation under [the CAA]." Congress defined this phrase in CAA section 304(f):

> For purposes of this section, the term "emission standard or limitation under [the CAA]" means—
>
> . . .
>
> (3) any condition or requirement of a permit under part C of subchapter I of [the CAA] . . . ; or
>
> (4) any other standard, limitation, or schedule established . . . under any applicable State implementation plan [SIP]. . . .

42 U.S.C. § 7604(f).

The conditions and requirements found in part C of subchapter I of the CAA, as well as the standards and limitations contained in SIPs, impose mandates on entities that must be fulfilled before the entities can obtain a PSD permit. Section 304(f)(3) and 304(f)(4) therefore authorizes CleanCOALition's claims against TXU, and authorizes private citizens as a general matter to sue to stop CAA violations that occur before a PSD permit is issued.

This construction of section 304(f)(3) and 304(f)(4) is supported by the plain language and structure of the CAA.

a. Pre-permit conditions and requirements under part C of subchapter I of the CAA constitute actionable emissions standards or limitations

CleanCOALition has contended section 304(f)(3) makes literal sense only if it is read to operate as a directive that: (1) there are certain conditions and requirements (which relate to permits), (2) found in part C of subchapter I of the CAA, and (3) those conditions and requirements are incorporated as "emission standard[s] or limitation[s]" within the meaning of section 304(f)(3). In contrast, TXU has contended section 304(f)(3) means: (1) when a permit is issued under part C of subchapter I of the CAA, (2) the permit will contain certain conditions or requirements, and (3) only those permit conditions or requirements are incorporated as "emission standard[s] or limitation[s]" under section 304(f)(3). The critical questions that arise from these competing constructions is whether the phrase "condition or requirement" refers to permit conditions or requirements *found under* part C of subchapter I or whether it refers to only conditions or requirements in permits *issued* under part C of subchapter I.

CleanCOALition's construction is correct, because section 304(f)(3) contemplates citizen suits *before* a PSD permit is issued, because the conditions and requirements under part C of subchapter I include

conditions and requirements to *obtain* a PSD permit. *See generally* 42 U.S.C. § 7475(a)(3),(4), & (6) (creating the "cause, or contribute" "best available control technology," and "air quality impacts" pre-permit conditions and requirements); *see also supra* pp. 7-8 (discussing the time for persons to comply with the relevant PSD conditions and requirements).

Courts, including the lower courts in this matter, nonetheless construe section 304(f)(3) to allow suit only after a PSD permit has been issued. *See, e.g.*, Appx. Exhibit A, pp. 14a-15a ("the phrase 'of a permit' [does] nothing more than broaden[] the definition of 'emission standard or limitation' to include those conditions and requirements *found* in any permit *issued* pursuant to . . ." part C of subchapter I of the CAA.) (emphasis added). *Cf. Weiler*, 392 F.3d at 538; *Sugarloaf*, 1994 WL 447442 at *8 n.9. This construction is incorrect, because it violates rules of grammar and otherwise cannot be reconciled with the structure of the CAA.

i. Rules of grammar support CleanCOALition's construction of CAA section 304(f)(3)

The language in section 304(f)(3) is susceptible to only one literal, and logical, interpretation under rules of grammar. As a starting point, it is necessary to consider the technical structure of the language in section 304(f)(3), which can be diagramed as follows: any condition or requirement / of a permit / under part C / of subchapter I / of the CAA. The first portion of this language, i.e., "any condition or requirement," represents the subject of section 304(f)(3), which is

followed by four consecutive prepositional phrases: (1) "of a permit," (2) "under part C," (3) "of subchapter I," (4) "of [the CAA] . . . ."[15]

To construe section 304(f)(3) properly, it is necessary to identify the prepositions and corresponding prepositional "objects" that constitute the prepositional phrases in the section. The first prepositional phrase includes the preposition "of" followed by the object of that preposition, "a permit." The second phrase includes the preposition "under" followed by the object of that preposition, "part C." The third phrase includes the preposition "of" followed by the object of that preposition, "subchapter I," and the fourth phrase includes the preposition "of" followed by the object of that preposition, "[the CAA]."

The meaning of section 304(f)(3) depends upon what these prepositional phrases are intended to "modify" in the language of the section. Rules of grammar allow two possibilities: "When two or more prepositional phrases follow each other, they may modify the [subject of a sentence], or one phrase may modify the object in the preceding phrase." *See* Grammar Handbook: Prepositional Phrases, University of Illinois at Urbana–Champaign, the Writers Workshop, the Center for

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[15] This successive use of prepositional phrases likely has contributed to courts' incorrect construction of section 304(f)(3): "Two prepositional phrases in a row turn on the warning light, three make a problem, and four invite disaster." *See* BRYAN A. GARNER ET AL., The Redbook: A Manual on Legal Style 177 (Thompson/West 2d ed. 2006) (quoting the expert on prose Richard A. Lanham). Close study therefore is necessary (*see* below) to ascertain the proper meaning of section 304(f)(3).

Writing Studies, *http://www.english.uiuc.edu/cws/wworkshop/writer_resources/grammar_handbook/prepositional_phrases.htm*. The issue therefore is whether the four, successive prepositional phrases in section 304(f)(3) modify the subject of section 304(f)(3), i.e., "any condition or requirement," or whether the phrases modify the respective objects in preceding prepositional phrases. There are examples of both in section 304(f)(3).

Considering the prepositional phrases in reverse order, the fourth and third prepositional phrases modify the objects in the preceding prepositional phrases. For instance, the fourth prepositional phrase, "of the [CAA]," modifies the preceding object, "subchapter I," and the third prepositional phrase, "of subchapter I," modifies the preceding object, "part C."

By contrast, a logical reading of section 304(f)(3) dictates that the second and first prepositional phrases both modify the subject "any condition or requirement." For instance, (again considering the prepositional phrases in reverse order) the second prepositional phrase, "under part C," modifies the subject, "condition or requirement," and the first prepositional phrase, "of a permit," also modifies the subject, "condition or requirement."

This is the only logical construction of the first and second prepositional phrases, because the alternative construction (which TXU and courts implicitly have advanced) is that the second prepositional phrase, "under part C," modifies the object in the first prepositional phrase, "a permit." Under this

construction, section 304(f)(3) would be read as if its emphasis is on: "a permit under part C." To the contrary, the section is logical only if it is read with emphasis on "any condition or requirement . . . under part C" (albeit, a condition or requirement that must relate to a permit).[16]

The inescapable flaw with the construction of section 304(f)(3) that emphasizes, "a permit under part C," is that there is no *literal* way for "a permit" to be "under part C." *Cf. Flora v. United States*, 357 U.S. 63, 65 (1958) ("In matters of statutory construction the duty of this Court is to give effect to the intent of Congress, and in doing so our first reference is of course to the *literal meaning* of words employed.") (emphasis added). By way of illustration, the phrase "a permit" reflects a noun form that refers to a tangible thing. When a tangible thing is discussed in reference to being "under" something, logic should dictate that the tangible thing physically is located in the position of "under." For instance, a shoe (i.e. a tangible thing) physically can be located "under" a table. It would be a non sequitur, however, to conclude a shoe could be located "under" some abstract concept. It likewise would be illogical to conclude "a permit" somehow could be "under" the abstract concept of a "part C." It simply strains logic to

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[16] This construction does not read "of a permit" out of the section. It treats this prepositional phrase as a qualifier intended to convey that part C of subchapter I of the CAA contains conditions and requirements of several variations. *See, e.g.*, 42 U.S.C. § 7471 (enumerating "requirements" under part C of subchapter I related to a state's SIP). However, only the conditions and requirements in part C of subchapter I related to permits are incorporated under section 304(f)(3).

conclude a tangible thing can have a proximity of being under something that only exists as an abstract concept.

The temptation may be to remedy this logical aberration by reading section 304(f)(3) as if it means "a permit *issued* under part C"; however, this would be improper, because Congress did not include the term "issued" in section 304(f)(3). *Cf. 62 Cases, More or Less, Each Containing Six Jars of Jam v. United States*, 340 U.S. 593, 596 (1951) ("But our problem is to construe what Congress has written. After all, Congress expresses its purpose by words. It is for us to ascertain-*neither to add* nor to subtract, neither to delete nor to distort.") (emphasis added).

Indeed, in a separate provision of CAA section 304, Congress used the phrase "permit *required* under part C of subchapter I" when it intended to convey that the relationship between the permit and part C is that the permit is issued under part C. *See* 42 U.S.C. § 7604(a)(3) (emphasis added). Congress used no such language in section 304(f)(3). Accordingly, it is improper to imply this meaning in the section. *See Allison Engine Co., Inc. v. United States*, 128 S. Ct. 2123, 2130 (2008) ("[W]hen Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (internal quotations omitted).

By contrast, in section 304(f)(3), the term "condition" and the term "requirement" both reflect noun forms that refer to conceptual, as opposed to tangible, things. There consequently is no strain on reason, nor need to

insert terms, when stating these conceptual things can exist "under" another conceptual thing; here, "part C" of the CAA. It consequently was logical for Congress to refer to a "condition or requirement" "under part C," but it would not have been logical for Congress to have referred to a "permit" as being "under part C."

CAA section 304(f)(3) consequently should be interpreted as a directive for parties to consult the *permit* conditions and requirements found under part C of subchapter I to determine which conditions and requirements are emissions standards or limitations within the meaning of section 304(f)(3). This construction is logical, and it relies solely on the literal meaning of the words used in section 304(f)(3). By contrast, TXU and the courts' interpretation of section 304(f)(3) requires insertion of the term "issued" for the section to make literal sense.[17]

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[17] The Fifth Circuit suggested its construction of section 304(a)(1) and 304(f)(3) was supported by the CAA's legislative history. *See* Appx. Exhibit A, p. 15a, n.6 (quoting H. Conf. Rep. No. 564, at 173 (1977), *as reprinted in* 1977 U.S.C.C.A.N. 1502, 1554). Although the Fifth Circuit initially seemed to acknowledge the legislative history relates to language found in CAA section *304(a)(3)*, 42 U.S.C. § 7604(a)(3), it nonetheless referenced the history as part of its analysis of CleanCOALition's section 304(a)(1) claim. This was incorrect, because section 304(a)(3) authorizes suit "against any person . . . who is alleged to have violated . . . or to be in violation of any condition of [a] permit" "required under part C of subchapter I of [the CAA] (*relating to significant deterioration of air quality*) or part D of subchapter I of [the CAA] (*relating to nonattainment*) . . . ." 42 U.S.C. § 7604(a)(3) (emphasis added). The relevant legislative history relates to this language in section 304(a)(3), because the enforcement of "part C" and "part D" permits referenced in section 304(a)(3) is a direct reference to the "significant deterioration [and] non-attainment permit[s]" expressly referenced in the legislative history.

Contextual cues in the structure of the CAA further support CleanCOALition's construction of section 304(f)(3).

ii. The structure of the CAA supports CleanCOALition's construction of CAA section 304(f)(3)

The structure of the CAA counsels against construing section 304(f)(3) to create a cause of action *only* for violation of conditions or requirements in *issued* PSD permits. *Cf. Jones v. United States*, 527 U.S. 373, 389 (1999) ("Statutory language must be read in context and a phrase gathers meaning from the words around it.") (internal quotations omitted). In CAA section 304(f)(4), and again under CAA section 304(a)(3), Congress created two independent causes of action for violations of conditions and requirements found in CAA permits. There consequently is no reason to conclude Congress intended section 304(f)(3) to be construed in a manner that conflicts with rules of grammar and logical, only to provide a third statutory basis for causes of action Congress otherwise had created.

Indeed, such a construction would make the causes of action in section 304(f)(4) and 304(a)(3) mere surplusage. *Cf. Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("It is our duty to give effect, if possible, to every clause and word of a statute. . . . We are thus reluctan[t] to treat statutory terms as surplusage in any setting.") (internal citations and quotations omitted). By way of illustration, in CAA section 304(f)(4), Congress created a cause of action to redress permit violations, by defining an actionable violation to include violation of "any permit

term or *condition* . . . ." 42 U.S.C. § 7604(f)(4) (emphasis added). Under CAA section 304(a)(3), Congress created another cause of action to redress permit violations by authorizing suit "against any person . . . who is alleged to have violated . . . or to be in violation of any *condition* of [a] permit" "*required* under part C of subchapter I of [the CAA] . . . ." 42 U.S.C. § 7604(a)(3) (emphasis added).

Section 304(a)(3) particularly is significant given Congress expressly created a cause action against persons who violate conditions of a PSD permit required under part C of subchapter I of the CAA. There is no foreseeable basis why Congress would have done this through section 304(a)(3), if Congress also contemplated section 304(f)(3) would be construed (necessitating strained logic and improper grammar) to create an identical cause of action.

Section 304(f)(3) consequently should not be construed to create a cause of action only for violations that occur *after* a PSD permit has been issued. As CleanCOALition has contended, the literal, and logical, construction of the section is that it creates a cause of action when the conditions or requirements under part C of subchapter I (related to permits) are violated, and such violations can occur before a person obtains a PSD permit. *See supra* pp. 7-8.[18]

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[18] CAA section 165(a)(2), 42 U.S.C. § 7475(a)(2), provides another contextual cue that Congress wanted pre-permit conditions and requirements to be enforceable, because the actual heading of the section is "Preconstruction *requirements*." (emphasis added). The substance of the section makes clear the "requirements" arise during the pre-permit stage, because: (Cont'd)

The lower courts in this matter, and courts from other circuits, therefore have misconstrued CAA section 304(f)(3), nullifying private citizens' ability to bring section 304(a)(1) claims. This undermines the objectives and effective enforcement of the CAA, because an entity can proceed with the permitting and construction process, *see supra* pp. 9-11, even when it is clear the entity is violating the CAA. Under *Weiler* and *Sugarloaf*, the entity even can complete the facility and begin operations. At that stage, the PSD mandates governing how power plants must be constructed, at best could serve as bases for civil penalties, but forever lost is the opportunity actually to enforce PSD mandates as Congress intended.

b. The standards and limitations in Texas's SIP constitute actionable emissions standards or limitations

CAA section 304(f)(4) also is a basis for a cause of action to redress pre-permit violations. The section defines "emission standard or limitation under [the CAA]" to include: "any other standard, limitation, or schedule established . . . under any applicable State implementation plan [SIP] . . . ." 42 U.S.C. § 7604(f)(4).

(Cont'd)

"No major emitting facility . . . may be constructed . . . unless . . . the *proposed* permit has been subject to a review in accordance with . . ." section 165(a)(2). (emphasis added). Because a PSD permit applicant has the duty to present the information and environmental analyses mandated by 165(a)(2), the required "review" cannot occur if the applicant fails to fulfill these obligations. *See Niagara Mowhawk Power Corp.*, 263 F. Supp. 2d at 663.

Texas's SIP incorporates pre-permit standards and limitations that are equivalent to the:

1. "cause and contribute,"[19]

2. "best available control technology,"[20] and

3. "air quality impacts" requirements.[21]

Indeed, the SIP specifies that "[i]n order to be granted a permit to construct, the owner or operator of the proposed facility shall *submit* information . . . which *will demonstrate* . . . ." the foregoing pre-permit standards and limitations.[22] TXU has not satisfied these requirements, because it never has undertaken the environmental and technical analyses that correspond with the requirements. TXU consequently is violating pre-permit standards and limitations in the Texas SIP, and these violations are actionable under section 304(a)(1). The lower courts in this matter, as well as other courts, nevertheless have concluded section 304(a)(1) cannot support a citizen suit based on violations of pre-permit standards and limitations in a SIP. *See, e.g.*, Appx. Exhibit A, p. 19a. This too undermines the

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[19] *See generally* 40 C.F.R. § 51.166(k); 1976 *Texas State Implementation Plan* § XIV (Rules & Regulations) at Rule 603.13, found at *http://www.tceq.state.tx.us*/assets/public/implementation/air/sip/sipdocs/1976-SIP/1976_sip_section_xiv.pdf.

[20] *See generally id.* at Rule 603.16.

[21] *See generally id.* at Rule 603.12.

[22] *See generally id.* at Rule 603.1 (emphasis added).

objectives and effective enforcement of the CAA, because it allows a CAA violator to proceed with the permitting, construction, and even completion of a CAA facility even when it is clear it is violating the CAA.

2. The matters at issue in this lawsuit can be resolved and the public interest will be served if the Court resolves the proper operation of CAA section 304(a)(1)

Courts essentially have construed the provisions of sections 304(a)(1) and 304(f) based on a lay interpretation of "emission standard" and "emission limitation." For instance, the courts have concluded a standard or limitation cannot be violated before a CAA facility is completed and operational. *See Weiler*, 392 F.3d at 538; *Sugarloaf*, 1994 WL 447442 at *8 n.9. This overly narrow construction of "emission standard or limitation" ignores the express language of CAA section 304(f), which defines the phrase to include a broad range of activities that occur, or obligations that arise, before a PSD permit has been issued and before a CAA facility is constructed, becomes operational, or begins emitting pollutants. For instance, the "best available control technology" analysis, and ultimate determination, must be preformed pre-permit and by definition is an "emission limitation." *See* 42 U.S.C. § 7479(3).

Courts, including the lower courts in this matter, nevertheless have struggled with the prospect of pre-permit violations, because the courts were troubled that violations could arise based on information, or lack thereof, in an application to obtain a PSD permit.

See, e.g., Appx. Exhibit A, p. 19a.[23] This, however, is the nature of the CAA permitting process, because persons are obligated to undertake certain CAA conditions and requirements before they seek (by way of application) a PSD permit. *See supra* pp. 7-8; 263 F. Supp. 2d at 663.[24]

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[23] For instance, the Fifth Circuit held *Niagara Mohawk* and related cases stand for the proposition that actionable violations of PSD requirements do not occur until a facility is constructed. *See* Appx. Exhibit A, p. 20a. The Fifth Circuit misperceives the holdings from *Niagara Mohawk* and the related cases. The courts in the respective cases did not resolve whether or when a CAA citizen suit can be brought based on pre-permit violations. The courts consequently did not suggest claims such as CleanCOALition's are impermissible. They instead were attempting to resolve whether violations of PSD requirements could be treated as continuing violations that toll a five-year statute of limitations for citizen suits. In this narrow context, they held a violation of the PSD obligations will not operate as an actionable CAA violation in perpetuity, but instead "accrues" when a CAA facility is constructed. The courts therefore concluded the statute of limitations was not tolled, and suit must be initiated within five years from the date of construction. This holding offers no insight into the matters presently at issue.

[24] A similar citizen suit provision under subchapter V of the CAA (which governs "operating" permits) also authorizes a suit to challenge a "proposed" permit. *See* 42 U.S.C. § 7661d(b)(2) (authorizing private citizens to petition the EPA Administrator to object to operating permits, *even if not yet issued*, and allowing citizens to file a citizen suit if the Administrator fails to object to a proposed permit). Congress therefore displayed no reservations about authorizing citizens to sue to remedy CAA violations that occur *before* a permit (PSD or operating) is issued. *But see Freeman v. Cincinnati Gas & Elec. Co.*, No. 1:05CV179, 2005 WL 2837466, at *2 (S.D. Ohio Oct. 27, 2005) (construed to mean no cause of action exists to challenge a *proposed* operating permit, although the express language of 42 U.S.C. § 7661d(b)(2) authorizes just such a cause of action).

In any event, CAA section 304(b)(1)(A) requires a potential CAA plaintiff to provide sixty-days notice of CAA violations before filing a citizen suit. *See* 42 U.S.C. § 7604(b)(1)(A). CleanCOALition did so here, and the sixty days expired without TXU curing its CAA violations. CleanCOALition consequently was authorized to move forward with its suit not merely because TXU's PSD permit application was defective, but because TXU disregarded CleanCOALition's notice and did not cure its violations of the relevant PSD obligations.

Accordingly, the nexus between the structural and practical operation of the CAA supports section 304(a)(1) claims based on pre-permit violations. Proper regard for the operation of section 304(a)(1) therefore dictates a person states a claim if he alleges violations of pre-permit conditions or requirements under part C of subchapter I or pre-permit standards or limitations in a SIP. Here, regardless of the ultimate outcome, CleanCOALition consequently has stated a legitimate cause of action against TXU.

Nonetheless, under current precedents, no such cause of action exists, even when it is clear a person has engaged in CAA violations at the pre-permit stage. This construction of section 304(a)(1) undermines effective enforcement of the CAA and jeopardizes Congress's objectives under the Act. CleanCOALition therefore respectfully requests that the Court grant this Petition for Writ of Certiorari to resolve the proper operation of CAA section 304(a)(1).

C. The Matters in this Lawsuit Can Be Resolved and the Public Interest Will Be Served if the Court Resolves whether CAA Section 304(a)(3) Operates to Prevent Construction of Plants Based on Defective PSD Permits

CAA section 304(a)(3) authorizes suit "against any person who proposes to construct or constructs . . . [a CAA] facility without a permit required under part C of subchapter I of [the CAA]. . . ." 42 U.S.C. § 7604(a)(3). CleanCOALition sued TXU under CAA section 304(a)(3), because TXU "proposes to construct" its power plant based on a defective PSD permit.

A fair reading of section 304(a)(3) is that it authorizes such suits. TXU nonetheless has contended section 304(a)(3) provides a cause of action only when an entity intends to construct a facility *with no permit at all.*[25] The lower courts, as well as other courts, have adopted this construction. *See, e.g.*, Appx. Exhibit A, pp. 22a-23a.

No legitimate interest would be served, indeed it would be counter-productive to the objectives of the CAA, if entities could propose to construct CAA facilities simply because they seek a PSD permit, no matter that the permit will be defective. Had Congress intended this, it would not have conditioned a section 304(a)(3) cause of action on the language: "permit required under part C of subchapter I . . . ." *See* 42 U.S.C. § 7604(a)(3). As discussed above, part C of subchapter I imposes conditions and requirements, on applicants, that are

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[25] ROA, p. 74; Hearing Transcript, pp. 4, 15, 17.

prerequisites to issuance of valid permits. Accordingly, a permit never can be "a permit required under part C of subchapter I" if an applicant has not satisfied the pre-permit conditions and requirements mandated therein. The CAA's legislative history appears to provide some support for this proposition.

Section 304(a)(3) was added to the CAA in 1977. The Senate summarized the new cause of action by explaining: "Section 304 of the Clean Air Act is amended to allow a citizen to bring suit to prevent construction of a major emitting facility without a permit *in compliance with . . . CAA § 165*[] . . . ." H. Conf. Rep. No. 564, at 173 (1977), *as reprinted in* 1977 U.S.C.C.A.N. 1502, 1553 (emphasis added).[26]

The plain language of section 304(a)(3), and related legislative history, therefore reflects Congress did not intend section 304(a)(3) to embrace only claims against entities that propose to construct a facility without *any* PSD permit. Section 304(a)(3) instead is a basis for claims against entities that propose to construct a CAA facility without a permit that actually complies with the CAA.

This is precisely the section 304(a)(3) cause of action CleanCOALition pleaded against TXU, because TXU never has completed the PSD prerequisites found under, *inter alia*, CAA section 165(a)(3),(4), & (6),

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[26] This clarifying language was not included in a subsequent House Conference Report, though the legislative record does not contain an explanation for the exclusion.

42 U.S.C. § 7475(a)(3),(4), & (6). TXU's PSD permit consequently is inherently defective and cannot be characterized as "a permit required under part C of subchapter I [of the CAA]."

Courts that have held no cause of action exists under these circumstances are usurping a critical CAA enforcement mechanism, because under the current state of the law, a person can propose and even begin preliminary construction of a CAA facility, *see* 2008 WL 2705570 at **2-3, even when the person seeks a PSD permit that will not comply with part C of subchapter I. This effectively denies citizens the ability to seek enforcement of the CAA at a time when enforcement actually could "protect and enhance the quality of the Nation's air resources . . . ." 42 U.S.C. § 7401(b)(1). CleanCOALition therefore respectfully requests that the Court grant this Petition for Writ of Certiorari to resolve the proper operation of CAA section 304(a)(3).

D. The Matters in this Lawsuit Can Be Resolved and the Public Interest Will Be Served if the Court Resolves whether the *Burford* Abstention Doctrine Is Inapplicable to CAA Citizen Suits

Congress authorized private citizens to sue in federal court to remedy CAA violations. 42 U.S.C. § 7604(a) ("district courts *shall have jurisdiction* . . . ." over CAA suits) (emphasis added). Application of *Burford* abstention to CAA citizen suits therefore subverts the central purpose of CAA section 304(a), i.e., creation of a *federal* cause of action to redress CAA violations.

There nonetheless is considerable discord between courts regarding whether *Burford* abstention is a valid basis for forgoing jurisdiction over CAA citizen suits. Whereas some courts have concluded abstention cannot be reconciled with the federal right of action granted in the CAA and similar statutes,[27] other courts (including the district court in this matter) have concluded abstention is appropriate.[28] Neither the history of the *Burford* abstention doctrine, nor the language or structure of the CAA permits abstention in CAA citizen suits.

1. Historical basis for the *Burford* abstention doctrine

The *Burford* abstention doctrine arose in *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). There, a plaintiff sued in federal court claiming the Texas Railroad Commission (the "Commission") violated the Fourteenth Amendment by granting a disputed drilling permit. *Id.* at 317. Texas had a centralized system for judicial

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[27] *See, e.g., Or. State Pub. Interest Research Group v. Pac. Coast Seafood Co.*, 341 F. Supp. 2d 1170, 1177-78 (D. Or. 2004); *L.E.A.D. v. Exide Corp.*, No. Civ. 96-3030, 1999 WL 124473, *22 (E.D. Pa. February 19, 1999); *Culbertson v. Coats Am., Inc.*, 913 F. Supp. 1572, 1578 (N.D. Ga. 1995); *Student Pub. Interest Research Group of New Jersey, Inc. v. P.D. Oil & Chem. Storage, Inc.*, 627 F. Supp. 1074, 1085 (D.N.J. 1986); *Brewer v. City of Bristol*, 577 F. Supp. 519, 524 (E.D. Tenn. 1983) (rejecting abstention doctrines for Clean Water Act and CAA citizen suits).

[28] *See* Appx. Exhibit B, p. 51a; *Ellis v. Gallatin Steel Co.*, 390 F.3d 461, 480 (6th Cir. 2004) (applying *Burford* in CAA citizen suit).

review of Commission orders, which allowed the state judiciary to develop extensive expertise on the relevant subject matter. 319 U.S. at 327. This Court consequently concluded efficiencies justified relinquishment of jurisdiction to the comparatively sophisticated Texas state courts. *Id.* at 334.

The *Burford* plaintiff's claim was not premised, however, on an express grant of congressional authority to sue in federal court. This differs materially from claims under CAA section 304(a), which are in fact premised on an express grant of authority to proceed in federal court. The narrow factual and procedural context of *Burford v. Sun Oil Co.* is critical to a understanding of the proper scope of the *Burford* abstention doctrine.

2. *Burford* abstention should not be extended to CAA citizen suits

The generic applicability of the *Burford* abstention doctrine cannot justify disregarding Congress's mandate that federal courts are the proper forum for section 304(a) citizen suits, because courts "are not at liberty to create an exception where Congress has declined to do so." *Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 874 (1991) (internal quotations omitted). Moreover, "[w]hen a statute limits a thing to be done in a particular mode, it includes a negative of any other mode." *Christensen v. Harris County*, 529 U.S. 576, 583 (2000).

The CAA consequently should be construed from the perspective that if Congress wanted state courts or agencies to have exclusive, or even concurrent,

jurisdiction over CAA citizen suits, Congress would have said so.[29] Likewise, if Congress wanted federal courts to abstain from exercising jurisdiction over citizen suits otherwise vested with the courts, Congress again would have said so. It did neither.

Indeed, Congress articulated none of the considerations underlying *Burford* abstention as limitations on private citizens' right to bring CAA citizen suits in federal court. By contrast, in other CAA provisions, Congress clearly signaled its awareness of the states' role in implementing other aspects of the CAA and expressly articulated those circumstances under which it wanted state involvement.

For instance, Congress expressly articulated the requirement that a private citizen must provide sixty-days notice to a CAA violator before suit, as well as pre-suit notice to the EPA *and* states in which violations occur. *See* 42 U.S.C. § 7604(b)(1); *see also* 40 C.F.R. § 54.2. The purpose of this pre-suit notice provision is to afford the EPA or states an opportunity to intervene to enforce the CAA before private citizens sue to enforce the Act.

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[29] The language and contextual cues in the CAA (discussed herein) justify application of the exceptions to the principle that courts generally "begin, in every case, with the presumption that state courts enjoy concurrent jurisdiction over [federal] claims. . . . . Only an explicit statutory directive, [an] unmistakable implication from legislative history, or . . . a clear incompatibility between state-court jurisdiction and federal interests will rebut the presumption." *Hathorn v. Lovorn*, 457 U.S. 255, 266 (1982) (internal citations and quotations omitted).

Also, in 42 U.S.C. § 7410(a), Congress expressly directed each state to establish a SIP governing certain *administrative* components of the CAA. Congress did not designate, however, state courts as the *judicial* forums for citizen suits.

The judiciary consequently should not interject, by fiat, abstention principles to accomplish a result Congress did not intend. This would rewrite the well-crafted provisions of the CAA, and contravene private citizens' congressionally granted right to bring citizen suits, in federal court, to redress CAA violations.

3. Federal courts have exclusive jurisdiction over CAA citizen suits

In any event, Congress intended federal courts to have exclusive jurisdiction over CAA suits. When the provisions of the CAA are read in context, this is the only logical construction of section 304(a).

a. In the CAA, Congress used the phrase "district courts" regarding only federal courts

In the CAA's judicial enforcement provisions, Congress used some variation of the phrase "district court" in contexts that mean *only* federal district courts. For instance, in CAA section 113(b), 42 U.S.C. § 7413(b), Congress authorized the EPA Administrator to bring a civil suit against any person violating CAA requirements incorporated into SIPs. Congress specified any "action under this subsection may be brought in the *district court* of the *United States*. . . ." 42 U.S.C. § 7413(b) (emphasis added).

In CAA section 204(a), 42 U.S.C. § 7523(a), Congress authorized the federal government to bring a civil action to enjoin violations of vehicle emissions requirements. Congress again specified that the "*district courts* of the *United States* shall have jurisdiction . . . ." 42 U.S.C. § 7523(a) (emphasis added). *See also* 42 U.S.C. § 7524(b); 42 U.S.C. § 7603. In CAA section 304(a), Congress created the federal citizen suits and used the truncated phrase "district courts" to specify the federal district courts "shall have jurisdiction" over such suits.

There is no reason to assume Congress intended the phrase "district courts" to have different meanings in the various provisions of the CAA. The "interrelationship and close proximity of these provisions . . . presents a classic case for application of the normal rule of construction that identical words used in different parts of the same act are intended to have the same meaning." *Comm'r v. Lundy*, 516 U.S. 235, 250 (1996) (internal quotations omitted).

Otherwise, Congress would have used the phrase "district courts" in section 304(a) in a manner contrary to how Congress used "district courts" in the other judicial enforcement provisions. The logical construction is that Congress intended the phrase "district court(s)" to have a consistent meaning throughout the CAA, i.e., federal district courts. Additional contextual language in the CAA compels this conclusion.

b. Contextual language necessitates construction of "district courts" to mean federal district courts

If "district courts" in section 304(a) is not construed to mean (only) federal district courts, the section would be illogical, because not all states have judicial tribunals referred to as "district courts." Arizona, California, Connecticut, Delaware, and Indiana have "superior" courts.[30] Georgia, Illinois, Michigan, Mississippi, Missouri, Oregon, South Carolina, South Dakota, Tennessee, West Virginia, and Wisconsin have "circuit" courts. Louisiana has "Parish" courts. New York has "Supreme Courts." Ohio has the "court of common pleas," and Pennsylvania has "commonwealth" courts.

It would be illogical to construe section 304(a) in a manner that ignores almost half the states do not have anything called "district courts" to correspond with the express language of section 304(a). Interpretations "of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982). Here, absurdity is avoided, and the express legislative purpose served, if "district courts" is construed to mean federal district courts, because the trial courts in the federal system are known as "district courts."

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[30] The District of Columbia also has "superior courts."

Indeed, Congress demonstrated its ability to invoke references to state judicial systems when, in fact, that was Congress's intent. In CAA section 502(b)(6), 42 U.S.C. § 7661a(b)(6), Congress directed the EPA Administrator to develop regulations requiring each state to develop an "operating permit" program (which is distinct from the PSD permit program), that included: "Adequate, streamlined, and reasonable procedures for . . . expeditious review of permit actions . . . and including an *opportunity for judicial review in State court* of the final permit action . . . ." (emphasis added). The EPA Administrator therefore promulgated 40 C.F.R. § 70.4(b)(3)(x). Congress could have, but did not, make any similar provision for state court review of violations related to PSD construction permits. Courts, consequently, should not read this into the CAA.

In CAA section 304(b)(1)(B), Congress indicated a section 304(a)(1) citizen suit is preempted if the United States or state government first initiates a CAA enforcement action. To specify these government actions could be brought in federal *or* state court, Congress did not use the phrase "district courts." Congress instead used language that actually articulates the right to proceed in either judicial system: "No action may be commenced . . . if the Administrator or State has commenced and is diligently prosecuting a civil action in a court of the United States *or* a State . . . ." 42 U.S.C. § 7604(b)(1)(B) (emphasis added).[31]

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[31] Other statutory enactments illustrate Congress appreciates the distinction between federal and state courts and knows how to articulate the distinction effectively. A citizen suit provision in the Federal Fair Housing Act provides: "An aggrieved person may commence a civil action in an appropriate United States district court *or* State court . . . ." 42 U.S.C. § 3613(a)(1)(A) (emphasis added).

Similarly, in CAA section 304(e), Congress clarified that nothing about Congress's creation of federal rights and remedies in the citizen suit provisions prohibited state governments from bringing suit in *state court*, under *state law*, to redress air pollution:

> Nothing in this section or in any other law of the United States shall be construed to prohibit, exclude, or restrict any State, local, or interstate authority from—
>
> [] bringing any enforcement action or obtaining any judicial remedy or sanction in any *State or local court* . . . . . under *State or local law* respecting control and abatement of air pollution.

42 U.S.C. § 7604(e) (emphasis added).

The foregoing provisions demonstrate Congress: (1) appreciated the difference between the state and federal systems; (2) knew how to refer to the separate state system when Congress, in fact, intended to do so; and (3) appreciated that after creating an exclusively federal regime for private citizen suits, it was necessary to clarify the limited circumstances when litigation was appropriate in state courts.

The CAA provides one additional, though significant, contextual indication that Congress intended citizen suits to be litigated in federal courts. In section 304(d), Congress enacted a provision that governs the procedure courts must follow when imposing bond or security requirements as conditions of injunctive relief

under the CAA. This provision specifies a court must follow the Federal Rules of Civil Procedure. *See* 42 U.S.C. § 7604(d).

It would be odd, and apparently a first, for Congress to mandate use of the Federal Rules of Civil Procedure, if Congress envisioned state court jurisdiction over citizen suits. Simply put, Congress would be forcing state courts to use federal procedure. This oddity is avoided if section 304 is construed from the perspective that Congress intended exclusive federal jurisdiction over CAA citizen suits.

A contextual reading of section 304 therefore compels the conclusion federal courts have exclusive jurisdiction over citizen suits. Courts, including the district court in this matter, that have held *Burford* abstention is permissible in a CAA citizen suit therefore undermine Congress's intended operation of the CAA. CleanCOALition therefore respectfully requests that the Court grant this Petition for Writ of Certiorari to resolve whether *Burford* abstention is in fact inappropriate in CAA citizen suits.

CONCLUSION

The lower courts in this matter, as well as courts from other circuits, have subverted essential enforcement provisions in the CAA, thereby undermining Congress's objectives in the Act. Congress's express creation of a federal mechanism for judicial enforcement of the CAA further has been undermined by application of the *Burford* abstention doctrine. Petitioners CleanCOALition and Robertson County: Our Land, Our Lives consequently have had their rights under the CAA abrogated, and Congress's intended operation of the CAA has been put in jeopardy as a general matter. Petitioners therefore respectfully request that the Court grant this Petition for Writ of Certiorari.

Respectfully submitted,

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